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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Anderson County
Honorable R. Lawton McIntosh, Circuit Court Judge
Appellate Case No. 2019-001502

The State, Respondent,

vs.

Dustin Lee Hooper, Appellant.

FINAL BRIEF OF RESPONDENT

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II. The trial court properly denied Appellant's motion to dismiss and for directed verdict because a proper video was produced and the State had ample evidence to convict.

STATEMENT OF THE CASE

This case has an extensive procedural history. Appellant was indicted for driving under the influence (DUI). On March 5-6, 2019, he proceeded to trial before the Honorable R. Lawton McIntosh. The jury found him guilty of DUI. On March 8, 2019, the trial court issued an order allowing Appellant to stay out on bond and indicating it was deferring sentencing until after an appeal has concluded. Shortly thereafter on March 15, 2019, Appellant filed a Motion to Reconsider pursuant to Rule 29, SCRCrimP. (Motion for Reconsideration; R.10). On July 25, 2019, the trial court held a hearing on the Motion to Reconsider. At the hearing, the trial court entered sentence for Appellant. (Sentencing Sheet; R.8). On the same date as the hearing, the trial court orally denied the Motion to Reconsider.

On August 8, 2019, Appellant served and filed a Motion for Relief of Judgment Pursuant to Rule 60(b)(1) in which he made the same arguments made in the Motion to Reconsider. (Motion for Relief of Judgment Pursuant to Rule 60(b)(1); R.22). Appellant then filed on August 9, 2019, a Motion to Amend seeking to rename the Motion for Relief of Judgment as a Motion to Vacate Judgment. (Motion to Amend; R.31). At the same time, he filed his Motion to Vacate Judgment, again making the same arguments made in the Motion to Reconsider and the Motion for Relief of Judgment. (Motion to Vacate Judgment; R.34).

On August 27, 2019, Judge McIntosh filed an Order stating: "The Motion to Amend, Motion to Vacate Judgment and Motion for Relief of Judgment in case number 2017-GS-04-0365 is DENIED without the necessity of a formal hearing." (Order Denying Motion; R.4). Subsequently, on August 29, 2019, the trial court held a hearing on the various motions filed by Appellant. On the same date, the trial court issued a second order denying Appellant's Motion to Vacate Judgment. (Order Denying Defendant's Motion to Vacate; R.6). Appellant served and

filed his Notice of Appeal on August 30, 2019. The State moved to dismiss the appeal, which was denied.[1] This brief follows.

[1] Motion to Dismiss and Order are both on file with this Court.

STATEMENT OF FACTS

On October 29, 2016, Deputy Coons received a "be on the lookout" (BOLO) call for a reckless driver in his vicinity. (T.5-6; R.45-46). Coons spotted a vehicle with the same license tag, though it was a different color than the one called in by a civilian. (T.6-7; R.46-47). After verifying the tag number, he turned around behind the vehicle. He initiated his blue lights after the vehicle made several attempts to get to the right-hand side of the road without using a turn signal. (T.7; R.47). The vehicle stopped and Deputy Coons made contact with the driver. (T.7-8; R.47-48). When asked for his license and registration, Appellant never produced a driver's license and instead attempted to hand the deputy a debit card. Deputy Coons noticed the smell of alcohol coming from Appellant, as well as the smell of marijuana in the vehicle. (T.8; R.48). Appellant was dazed, his speech was slurred, and he appeared disoriented. (T.9; R.49). Deputy Coons also noticed an open bottle of Crown Royal in the passenger's seat. (T.9; 17; R.49; 57).

Trooper Griffin with the South Carolina Highway Patrol received the same BOLO as Deputy Coons. (T.29; R.69). He saw Deputy Coons with his blue lights on behind a vehicle matching the BOLO so he pulled in behind. He arrived as Deputy Coons was speaking to Appellant in the driver's seat. (T.29-30; R.69-70). Trooper Griffin spoke to Appellant, who admitted driving. (T.30; R.70). Trooper Griffin noticed the odor of alcohol coming from Appellant, as well as his disorientation and slurred speech. (T.30; R.70). He had Appellant perform three field sobriety tests—the HGN, the walk and turn, and the raise one foot tests. Appellant failed to properly perform on all tests. (State's Exhibit 1; T.30-35; R.70-75). After being arrested, Appellant was offered a breath test and refused. (T.39; R.79).

ARGUMENT

I. This Court does not have jurisdiction to consider this appeal and should dismiss the appeal as untimely because Appellant filed successive post-trial motions or if the first post-trial motion was a nullity, his second motion was untimely.

This Court is without jurisdiction to consider this appeal because the Notice of Appeal was not timely served. Appellant filed successive post-trial motions, which means his Notice of Appeal after the denial of his second post-trial motion was untimely. Even if the first post-trial motion was a nullity under the unique facts of this case, his second motion was untimely served and filed and, again, his Notice of Appeal was untimely. Accordingly, this Court should dismiss this appeal and not consider it on the merits.

As discussed above, this case has an extensive procedural history which results in the appeal not being timely filed. Appellant served and filed his first Motion to Reconsider, which was considered and ruled upon by the trial court on July 25, 2019. As a result of the denial of his Motion to Reconsider, Appellant should have served and filed a Notice of Appeal no later than August 5, 2019. Instead, he served and filed a subsequent motion—albeit one that does not exist under the South Carolina Rules of Criminal Procedure—untimely on August 8. Even considering his attempt to amend the motion, the second motion was still an incorrect attempt at a subsequent motion to reconsider. The trial court did not have jurisdiction to consider the second motion. As a result, his Notice of Appeal from the denial of his second motion was untimely. See State v. Pfeiffer, 427 S.C. 10, 828 S.E.2d 764 (2019) ("Successive Rule 29(a) motions are generally not permitted."); Elam v. S.C. Dep't of Transp., 361 S.C. 9, 15, 602 S.E.2d 772, 775 (2004) ("[A] second motion for reconsideration . . . is appropriate only if it challenges something that was altered from the original judgement as a result of the initial motion for reconsideration."

(discussing Coward Hund Constr. Co. v. Ball Corp., 336 S.C. 1, 3–4, 518 S.E.2d 56, 58 (Ct. App. 1999))).

Additionally, because sentencing did not occur until July 25, 2019, a Motion to Reconsider would not have been proper until after sentencing. See Rule 29, SCCrimP. Appellant's first Motion to Reconsider, which admittedly was filed before July 25, was considered by the Court on July 25 and orally denied the same day. It should be considered timely made, however, because the trial court considered it only after sentencing and all parties considered it as a properly filed motion. The motion was denied, thereby rendering the second post-trial motion, which raised the same grounds as the original motion, and did not address any ruling changed as a result of the initial post-trial motion, a successive post-trial motion.

However, even if this Court considers the first Motion to Reconsider a nullity because Appellant was not sentenced until July 25, 2019, and the motion was filed prior to that date, his second motion was required to have been served and filed within ten days of sentencing, or no later than August 5, 2019. See Rule 29, SCCrimP ("Except for motions for new trials based on after-discovered evidence, post-trial motions shall be made within ten (10) days after the imposition of the sentence."). Instead, the motion was made on August 8, 2019 and was, therefore, untimely.[2] Because the second motion was untimely filed, it should not have been considered by the trial court and did not stay the time for the service and filing of the Notice of Appeal.

As a result, whether this Court considers the second post-trial motion successive or untimely filed, this Court does not have jurisdiction to hear this appeal because a timely Notice of Appeal was not served. See State v. Devore, 416 S.C. 115, 119, 784 S.E.2d 690, 692 (Ct. App.

[2] It is important to note the date of filing with the Clerk of Court on the bottom of the Motion for Relief of Judgment. (Motion for Relief of Judgment; R.22).

2016) ("The requirement of service of the notice of appeal is jurisdictional, i.e., if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to 'rescue' the delinquent party by extending or ignoring the deadline for service of the notice." (quoting USAA Prop. & Cas. Ins. Co. v. Clegg, 377 S.C. 643, 651, 661 S.E.2d 791, 795 (2008))); Rule 203(b)(2), SCACR ("After a plea or trial resulting in conviction or a proceeding resulting in revocation of probation, a notice of appeal shall be served on all respondents within ten (10) days after the sentence is imposed. When a timely post-trial motion is made under Rule 29(a), SCRCrimP, the time to appeal shall be stayed and shall begin to run from receipt of written notice of entry of an order granting or denying such motion."). Accordingly, this Court should dismiss the appeal and not consider the merits.

II. The trial court properly denied Appellant's motion to dismiss and for directed verdict because a proper video was produced and the State had ample evidence to convict.

Appellant maintains the trial court erred in finding a proper video was admitted and in finding sufficient evidence to allow the case to proceed to the jury. He asserts Deputy Coons should be considered the arresting officer and not Trooper Griffin. He contends because Deputy Coons did not produce a video, because his vehicle was not equipped with recording equipment, the case should have been dismissed. However, Trooper Griffin was the arresting officer and properly supplied a video in compliance with section 56-5-2953 of the South Carolina Code. Additionally, Trooper Griffin did not need to personally see Appellant driving to be able to arrest him for DUI. Finally, there was clear reasonable suspicion to stop Appellant, which was known to Trooper Griffin and he could further rely on the information provided by Deputy Coons.

In criminal cases, the court of appeals sits to review errors of law only and is bound by the factual findings of the trial court unless clearly erroneous. State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001). "The cardinal rule of statutory construction is a court must ascertain and give effect to the intent of the legislature." State v. Scott, 351 S.C. 584, 588, 571 S.E.2d 700, 702 (2002) (citing Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 437 S.E.2d 6 (1993)).

> All rules of statutory construction are subservient to the maxim that legislative intent must prevail if it can be reasonably discovered in the language used. A statute's language must be construed in light of the intended purpose of the statute. Whenever possible, legislative intent should be found in the plain language of the statute itself.

State v. Pittman, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007) (internal citations omitted).

"The legislature's intent should be ascertained primarily from the plain language of the statute. Words must be given their plain and ordinary meaning without resorting to subtle or forced construction which limits or expands the statute's operation." State v. Dupree, 354 S.C. 676, 693, 583 S.E.2d 437, 446 (Ct. App. 2003) (internal citation omitted). Pursuant to Section 56-5-2953:

> (A) A person who violates Section 56-5-2930, 56-5-2933, or 56-5-2945 must have his conduct at the incident site and the breath test site video recorded.
>
> (1)(a) The video recording at the incident site must:
>
> (i) not begin later than the activation of the officer's blue lights;
>
> (ii) include any field sobriety tests administered; and
>
> (iii) include the arrest of a person for a violation of Section 56-5-2930 or Section 56-5-2933, or a probable cause determination in that the person violated Section 56-5-2945, and show the person being advised of his Miranda rights.

S.C. Code Ann. § 56-5-2953(A) (Supp. 2016). Additionally, subsection (B) specifies:

> Failure by the arresting officer to produce the video recording required by this section is not alone a ground for dismissal of any charge made pursuant to Section 56-5-2930, 56-5-2933, or 56-5-2945 if the arresting officer submits a sworn affidavit certifying that the video recording equipment at the time of the arrest or probable cause determination, or video equipment at the breath test facility was in an inoperable condition . . . or, in the alternative, submits a sworn affidavit certifying that it was physically impossible to produce the video recording because the person needed emergency medical treatment, or exigent circumstances existed. In circumstances including, but not limited to, road blocks, traffic accident investigations, and citizens' arrests, where an arrest has been made and the video recording equipment has not been activated by blue lights, the failure by the arresting officer to produce the video recordings required by this section is not alone a ground for dismissal. However, as soon as video recording is practicable in these circumstances, video recording must begin and conform with the provisions of this section. Nothing in this section prohibits the court from considering any other valid reason for the failure to

> produce the video recording based upon the totality of the circumstances . . . .

S.C. Code Ann. § 56-5-2953(B) (Supp. 2016). The initial question is which officer should be considered the "arresting officer" and was, therefore, responsible for providing a video recording meeting the requirements of section 56-5-2953(A).

This Court considered a similar question in State v. Landis, 362 S.C. 97, 606 S.E.2d 503 (Ct. App. 2004). In Landis, a State Transport Officer initiated his blue lights and performed the stop of the defendant. A Trooper was behind the Transport Officer and pulled in behind after the stop. The Transport Officer removed Landis from the vehicle, but the Trooper performed the field sobriety tests and ultimately arrested the defendant for DUI. The Trooper provided an affidavit indicating his vehicle's equipment malfunctioned, but no such affidavit was obtained from the Transport Officer who actually conducted the stop. Id. at 100, 606 S.E.2d at 505. This Court concluded the Trooper was the arresting officer and indicated:

> Pellucidly, the record supports the finding that Trooper Davis was the "arresting officer" as that phrase is ordinarily understood. Trooper Davis personally observed Landis' driving prior to the traffic stop. He arrived at the scene simultaneously with the State Transport Officer. Trooper Davis pulled in directly behind the Transport Officer and approached just after Landis had been removed from his vehicle. Moreover, Trooper Davis conducted the field sobriety test, determined Landis was impaired, and **placed him under arrest for DUI.**

State v. Landis, 362 S.C. 97, 104, 606 S.E.2d 503, 506 (Ct. App. 2004) (emphasis in original). While this Court did indicate the Trooper saw Landis driving, the emphasis by the Court is placed on the fact the Trooper "**placed him under arrest for DUI.**" The Court acknowledged the Transport Officer conducted the actual stop, but indicated his role was "facilitating the traffic stop."

Appellant claims "Trooper Griffin did not observe Hooper's driving and was not present during the stop." (App. Br. 5). The record belies this assertion. While Deputy Coons initially saw Appellant driving after receiving the BOLO, and pulled Appellant over based on the reckless driving BOLO, Trooper Griffin also saw the violation occur because he witnessed Appellant driving. Trooper Griffin was asked: "You saw him driving because you were driving in the opposite direction, right?" Trooper Griffin responded: "Yes, sir." He further indicated: "At the time I saw him, he was already being pulled over and was turning right." Counsel followed up: "But he was still driving?" The Trooper answered: "Yes, sir." (T.42-43; R.82-83).

The instant case should be considered no different than Landis. While Deputy Coons conducted the stop, Trooper Griffin interacted with Appellant, performed the field sobriety tests, determined Appellant was intoxicated and materially and appreciably impaired, and placed Appellant under arrest for DUI. (State's Exhibit 1). Based on the clear language of the statute and the common, ordinary definition of "arresting officer," this Court should find Trooper Griffin is the arresting officer and the one responsible for providing a video recording of the incident scene.

Additionally, everything required to be recorded by section 56-5-2953(A) occurred after Trooper Griffin arrived at the scene and was recorded by Trooper Griffin's camera. He started his camera upon activation of blue lights. It recorded the field sobriety tests being performed, it showed the arrest, and it showed Miranda warnings being read. (State's Exhibit 1). A proper video was provided by the arresting officer, so there was no reason for the court to dismiss the case.[3]

[3] Even if some aspect of the video was missing or improper, this Court should affirm the trial court's refusal to dismiss the case pursuant to Section 56-5-2953(B) which allows the court to consider the totality of the circumstances in allowing a case to proceed. In the instant case, there was ample circumstances justifying the way in which this case was presented. Deputy Coons, after receiving a BOLO for reckless driving, should not be required to just allow Appellant to

Appellant contends the video must show the stop itself. However, that is not included anywhere in the language of the statute. Requiring the video to include the stop would be to write into the law requirements which do not otherwise exist and were not intended by the legislature. See Brown v. S.C. Dep't of Health & Envtl. Control, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002) ("An appellate court cannot construe a statute without regard to its plain meaning and may not resort to a forced interpretation in an attempt to expand or limit the scope of a statute."). As three Justices frankly reiterated in a recent case: "If it were true courts have the authority to interpret statutes according to a sense of justice and right, then courts would have the power to rewrite statutes to suit their own personal preferences, regardless of legislative intent. **Courts do not have that power.**" Buchanan v. S.C. Prop. & Cas. Ins. Guar. Ass'n, 424 S.C. 542, 553, 819 S.E.2d 124, 130 (2018) (Few, J. concurring) (emphasis added).

In addition, Appellant claims the video needs to show the "violation," otherwise "the reason for the stop could not be ascertained" and to protect the public from "baseless, invalid, or unlawful stops." (App. Br. 12-13). In this case, either officer had ample reasonable suspicion in order to stop Appellant's vehicle without seeing any additional driving infraction. The reason the officers were looking for Appellant was because of a BOLO that was issued. The BOLO was issued because a citizen called in the concern for a reckless driver. The information indicated the type of car, the license tag, and the area in which the car would be located. This scenario is nearly identical to Navarette v. California, 572 U.S. 393 (2014) (finding caller's 911 call about reckless

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continue driving without making a stop because he did not have a camera. Once he made the stop, which was clearly in the interest of the public's safety, he turned the situation over to Trooper Griffin who had a camera and could properly record what took place. Trooper Griffin's recording began as soon as practicable and included every aspect required by Section 56-5-2953(A) to the extent possible. See e.g., State v. Henkel, 413 S.C. 9, 774 S.E.2d 458 (2015).

driver was reliable and provided sufficient reasonable suspicion to justify traffic stop even when officer failed to see any improper driving).

In the instant case, the stop was proper because either officer had reasonable suspicion resulting from the BOLO and Deputy Coons developed additional reasonable suspicion when Appellant attempted to move to the right without using a turn signal. While Deputy Coons conducted the actual stop of Appellant's vehicle, Trooper Griffin was the clear "arresting officer" and therefore the one responsible for providing a video. Trooper Griffin had all the necessary reasonable suspicion to stop Appellant, saw Appellant driving, interacted with Appellant at the incident scene, conducted the field sobriety tests, determined Appellant was impaired, and placed Appellant under arrest for DUI. Additionally, all of Trooper Griffin's interactions with Appellant were recorded and presented to the court and jury. (State's Exhibit 1). As a result, the trial court properly refused to dismiss Appellant's case as the State fully complied with section 56-5-2953 of the South Carolina Code.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Final Brief of Respondent filed October 20, 2020, complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, 407 S.C. 607, 607, 757 S.E.2d 421 (2014) (requiring redaction of social security numbers, names of minor children, financial account numbers, home addresses, and date of birth).

This 20th day of October, 2020.

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